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APR 18 2005

OFFICE OF PETITIONS

In re Application of	:	
Van Haeringen et al.	:	DECISION ON PETITION
Application No. 10/676,849	:	and
Filed: September 30, 2003	:	CORRECTION OF DECISION
Attorney Docket No. 2183-6002.1US	:	MAILED JULY 14, 2004

This is a decision on the "PETITION TO PRESERVE A FILING DATE AND PETITION IN RESPONSE TO NOTICE OF INCOMPLETE APPLICATION UNDER 37 C.F.R. 1.53(e)," filed February 16, 2005. Applicants request that the above-identified nonprovisional application be accorded a filing date of September 30, 2003, with no drawings present in the application.

The petition is **GRANTED**.

Application papers in the above-identified nonprovisional application were deposited on September 30, 2003. However, on March 2, 2004, the Initial Patent Examination Division mailed applicants a "Notice of Incomplete Nonprovisional Application," stating that the application papers deposited September 30, 2003 had not been accorded a filing date because the application was deposited without drawings. In addition, the basic filing fee and oath or declaration were missing.

On May 5, 2004, applicants filed a response including the basic filing fee, a Declaration and power of attorney and drawings. Accordingly, the Office accorded the application a filing date of May 5, 2004, the date of filing of the drawings.

In response, applicants filed the instant petition. Applicants state that the drawings were submitted by mistake and unintentionally and that they are unnecessary for an understanding of the invention under 35 U.S.C. 113 (first sentence). (Applicants state that they mistakenly believed the Notice received was a Notice of Missing Parts). Citing MPEP 601.01(f), applicants point out that the application includes at least one method claim, and thus, a drawing is not required.

RELEVANT STATUTES AND REGULATIONS

35 U.S.C. 111(a)(4) provides that:

The filing date of an application shall be the date on which the specification and any required drawing are received in the Patent and Trademark Office.

However, as stated in MPEP 601.01(f)

It has been USPTO practice to treat an application that contains at least one process or method claim as an application for which a drawing is not necessary for an understanding of the invention under 35 U.S.C. 113 (first sentence).

MPEP § 601.01(f) also states that:

a nonprovisional application having at least one claim ..., directed to subject matter discussed above for which a drawing is usually not considered essential for a filing date, describing drawing figure(s) in the specification, but filed without drawings will be treated as an application without all of the drawing figures referred to in the specification as discussed in MPEP § 601.01(g), so long as the application contains something that can be construed as a written description.

And, MPEP § 601.01(g) further provides that:

If the application is filed without all of the drawing figure(s) referred to in the specification, ..., OIPE will mail a "Notice of Omitted Item(s)" indicating that the application papers so deposited have been accorded a filing date, but are lacking some of the figures of the drawings described in the specification.

DISCUSSION

A review of the application confirms that as filed on September 30, 2003 the application contained at least one method claim. Pursuant to § 601.01(f), a drawing is not considered essential for a filing date. Thus, the application is entitled to a filing date without drawings present in the application.

However, as the specification in the instant nonprovisional application contained reference to drawing figures 1 through 3 (Brief Description of Drawings, pp. 5-6 of Specification), mailing of a Notice requiring submission of those drawings was appropriate. The Office should have mailed a "Notice of Omitted Items" rather than a "Notice of Incomplete Nonprovisional Application." To the extent that the Notice denied a filing date, the "Notice of Incomplete Nonprovisional Application" mailed March 2, 2004, was mailed in error and is hereby **withdrawn**.

In view thereof, the application as originally deposited without drawings is entitled to a filing date of September 30, 2003.

Given the basis for granting the petition, the petition fee is being refunded to Deposit Account No. 20-1469, as authorized.

**NOTICE OF VACATING OF DECISION ON PETITION TO REVIVE
MAILED JULY 14, 2004**

It is further noted that the instant application did not become abandoned for failure to timely file a proper response to the Notice of Incomplete Nonprovisional Application. The Notice mailed March 2, 2004, required that applicants file the statutory basic filing fee; an executed oath or declaration; the late surcharge; and additional claim fees within 2 months (or within any extensions of time obtained under § 1.136(a)) of the mail date of the Notice to avoid abandonment of the application.

On May 10, 2004, applicants filed the noted responses along with authorization to charge a Deposit Account any required fees and a petition to revive under § 1.137(b). Pursuant to the authorization, the fee for extension of time for response within the first month (to June 2, 2004) should have been charged to make this response timely. Instead, the petition fee of \$665 was charged and by decision mailed July 14, 2004, the petition to revive was granted. To correct this error, the extension of time fee, in effect on May 10, 2004, is being charged to petitioner's Deposit Account, and the petition fee is being refunded to petitioner's Deposit Account. The decision granting the petition mailed July 14, 2004 was mailed in error and is hereby vacated. The petition to revive is hereby dismissed as moot without consideration on the merits.

As to the drawings and the according of a filing date, the Notice was intended to advise applicants that the filing date would be the date of receipt of the drawings and a newly executed oath or declaration covering the drawings. The Notice further provided that failure to satisfy 35 U.S.C. 113, within **TWO MONTHS** would result in termination of proceedings (not abandonment). However, in this instance, the Office did not terminate proceedings. Moreover, the Director has not dismissed the instant petition as untimely filed, but rather has considered the petition on the merits. See § 1.181(f).

CONCLUSION

The Office of Initial Patent Examination (OIPE) has been advised of this decision. Pursuant to this decision, the application has been referred to OIPE for correction of the filing date to September 30, 2003 and for indication in Office records, as appropriate, that "0" sheets of drawings were present on filing.

Thereafter, the application will be forwarded to Technology Center AU 1637 for examination in due course.

Telephone inquiries specific to this decision may be directed to the undersigned at (571) 272-3219.


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